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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

Calvin White,
Petitioner

V.

Ormet Primary Aluminum Corporation

On Petition for Writ Of Certiorari
To The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Appellant, Calvin White, suffered discrimination and retaliation for opposing "any practice made an unlawful employment practice" in violation of 42 USC §2000e-3 when he was unfairly placed on Ormet's Absenteeism Program, was verbally harassed by supervisors, was made to perform tasks others in his position were not made to perform and was eventually terminated.

2. Whether the United States Court of Appeals for the Fifth Circuit has incorrectly interpreted 42 U.S.C. §2000e-3 to encompass only "ultimate employment decisions" as retaliatory acts actionable under Title VII. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997).

PARTIES INVOLVED

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DISTRICT COURT

United States District Court
for the Middle District of Louisiana
White v. Ormet Primary Aluminum Corporation
CA No. 97-CV-1006.

APPELLATE COURT CITATION
White v. Ormet, 2001 U.S. App. Lexis 22623 (5th Cir. 2001)

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari is taken from the judgment of the United States Court of Appeals for the Fifth Circuit, entered on September 7, 2001, and affirming the summary judgment dismissal of the United States District Court, Middle District of Louisiana, entered on April 20, 2000.

This Court has jurisdiction to hear the present case pursuant to 28 U.S.C. § 1254, which provides, in pertinent part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

STATUTES INVOLVED

42 U.S.C. §2000e-2 (see appendix for text)

42 U.S.C. §2000e-3 (see appendix for text)

CONCISE STATEMENT OF THE CASE

This suit was filed in the United States District Court for the Middle District of Louisiana on October 20, 1997 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., with jurisdiction being conferred by 28 U.S.C. §1343(4). The District Court entered a final judgment granting summary judgment in favor of Ormet on April 17, 2000. The United States Court of Appeals for the Fifth Circuit affirmed the district court's dismissal in an unpublished opinion dated September 7, 2001 and entered that same day.

Petitioner, Calvin White, was employed at Ormet Primary Aluminum Corporation from January 30, 1989 until September 5, 1997 when he was terminated from his position in the Digestion and Filtration Department of Ormet's alumina plant. Mr. White had worked in various positions at Ormet and was classified as a filtration auxiliary man (FAM) when he was terminated for allegedly sleeping on the job.

In 1995, Calvin White was recommended to fill a shift supervisor position. However, the position was given to another employee. Mr. White was told that he did not score high enough on a reading test that applicants were required to take. Of the three applicants to apply for the position, two were black, one was white. Although Calvin White was the most highly recommended person for the position, the white applicant was given the job due to his supposed higher score on the reading test. TR. 372. Also, unlike other employees, Mr. White was never asked to retest nor was he even told that other supervisory jobs were available. TR. 368, 371.
Due to these circumstances, Calvin White filed a charge with the Equal Employment Opportunity Commission (EEOC) in May, 1995 alleging he had been discriminated against due to his not being promoted. TR. 340.

Soon thereafter Mr. White began to feel he was being retaliated against by not being given the appropriate

overtime hours and filed a second charge with the EEOC in November, 1995. Ormet then retaliated against Calvin White by disciplining him in the company's Absenteeism Control Program, a mechanism used by the company to limit the days an employee can be absent or tardy in a certain period. TR. 388. On May 24, 1996, Mr. White was placed in Step 1 (notification stage) of the absentee program for **previous** absences. TR. 623. Soon thereafter, on June 24, 1996, Mr. White was placed in Step 2 of the program (written warning). TR. 623, 332. On July 12, 1996, Mr. White filed a union grievance concerning the discriminatory treatment of black employees. On July 22, 1996, Calvin White was placed in Step 3 of the Absenteeism Program despite the fact that he had provided Ormet with medical excuses as required under the collective bargaining agreement. TR. 623. On September 5, 1996, Mr. White filed a third EEOC charge concerning his being placed on the absenteeism program. On October 31, 1996 Mr. White cut himself off the job. He called in sick that next day and obtained the required medical excuse. On November 4, 1996, Mr. White was cleared to return to work. That same day he was contacted by a union representative and warned him that his supervisor was going to terminate him if he did not sign a "last chance agreement" that required an employee to work 180 days without missing a day. Mr. White did not sign the form pursuant to advice from a union staff representative. When Calvin reported for work, he was not forced to sign the "last chance agreement" but was told that it would go into his file and that his employment would be terminated if he missed another day. TR. 366-367. Despite the fact that Mr. White's absences were eventually erased, his being placed in the absenteeism program evidences a pattern of retaliatory harassment nonetheless.

Ormet, through its supervisors, also retaliated against Calvin White by forcing him to do menial tasks that others in his position were not forced to do (TR. 366) and by continual

verbal harassment. TR. 368. Evidence shows that the work atmosphere at Ormet was replete with racial discrimination and harassment. TR 364-371, 362, 351, 342, 341. The actions of the defendant were so egregious that Mr. White was forced to undergo medical treatment. TR. 369.

Ormet's retaliation against Calvin White culminated in his termination on September 5, 1997, subsequent to his being accused of sleeping on the job by Mickey Chaney. TR. 365. Mr. Chaney had no other witnesses to substantiate his allegations even though he had plenty of time to get other witnesses and even spoke with another employee while he was supposedly watching Mr. White sleep. TR. 172. This employee whom Mr. Chaney spoke with did not witness Mr. White sleeping. TR. 172. Evidence also shows that Mr. White was making telephone calls to Andrew Thompson and Vernell Jackson during the time when he was supposed to be sleeping. TR. 360, 331. . Also relevant is the fact that Mr. Chaney had been overheard on August 18, 1997 saying that "he could do to Calvin whatever he wanted to because he's working without a contract," referring to the lack of a contract between the Union and Ormet. TR. 362. At arbitration, Mr. White's termination was overturned due to the company's lack of evidence.

Calvin White was discriminated against because of his race and was retaliated against because he attempted to change his discriminatory work environment. He was not given the opportunities afforded to his white co-workers (TR. 371-372) and, after he complained of this, he was retaliated against by being put on the absenteeism program although his absences were excused (and at least partially caused by the discrimination and retaliation) against him (TR. 368), by being given menial jobs (TR. 366), by being verbally harassed (TR. 367) and finally terminated (TR. 365). The actions of Ormet not only caused Calvin White to lose money and eventually his job, but also caused him emotional pain and stress. TR. 369.

ARGUMENT

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3 makes it unlawful for an employer to discriminate against its employees "because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title." It is generally accepted that in order to establish a prima facie case of retaliation a plaintiff must show that: (1) he engaged in a protected activity; (2) the employer took an adverse employment action against him; and (3) a causal connection existed between the protected activity and the asserted adverse action. *Garber v. New York City Police Dep't*, 1998 U.S. App. LEXIS 20181, (2nd Cir. 1998); *Lee v. Gecewicz*, 1999 U.S. Dist. Lexis, 7317 (E.D. Pa. May 20, 1999); *Von Gunten v. Maryland*, 243 F. 3d 858 (4th Cir. 2001); *Mattern v. Eastman Kodak Co.* 104 F.3d 702 (5th Cir. 1997); *Ray v. Henderson*, 217 F.3d 1234, (9th Cir. Cal. 2000). The District Court dismissed Calvin White's claims because, since his absences were erased and he was offered reinstatement pursuant to arbitration, he had not established his prima facie case as he had not suffered an adverse employment action. However, the evidence shows that Calvin White suffered actionable harassment under 42 U.S.C. §2000e-3 due to his being verbally harassed by members of Ormet's management, being forced to work jobs others in his position were not forced, being unfairly placed on Ormet's absenteeism program and ultimately terminated for allegedly sleeping on the job. The Fifth Circuit affirmed the District Court's ruling for "essentially the reasons stated by the trial court." However, under the Fifth Circuit's interpretation of 42 U.S.C. §2000e-3, a finding of unlawful retaliation requires that an employee suffer an "ultimate employment decision." *Mattern v. Eastman Kodak Co.* 104 F.3d 702 (5th Cir. 1997). The Fifth Circuit has incorrectly

interpreted 42 U.S.C. §2000e-3 as evidenced by the majority of circuits which have held that an "adverse employment decision" under 42 U.S.C. §2000e-3 is not the same as an "ultimate employment decision" as stated by the Fifth Circuit's ruling in *Mattern.* Calvin White may not have suffered an "ultimate employment decision", but he did suffer adverse employment actions made illegal by 42 U.S.C. §2000e-3. The actions of Ormet created a chilling effect such that other employees would be afraid to protect their right to a workplace free of discrimination.

The well-recognized split concerning what constitutes an adverse employment action is noted by the following decisions.

First Circuit

The First Circuit has generally held the protection afforded to employees from retaliation to be quite broad. In *Wyatt v. City of Boston,* 35 F.3d 13 (1st Cir. Mass. 1994) the First Circuit reversed the dismissal of plaintiff's two charges of retaliation. In *Wyatt* the plaintiff alleged that he was denied promotion, received negative evaluations, was transferred to another school, was not given a choice concerning the class he was to teach and was terminated due to his charges of sex discrimination. The district court dismissed the plaintiff's claims because it found that the defendant had good cause to terminate the plaintiff. Concerning the matter of adverse employment actions, the Court of Appeals notes, "In addition to discharges, other adverse actions are covered by § 2000e-3(a). *Wyatt, supra,* at 15. The Court then goes on the cite Employment Discrimination § 87.20, at 17-101 to 17-107, which states that "actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other

employees" are also adverse actions protected by 42 U.S.C. §2000e-3. *Id.*

The First Circuit notes, in a more recent case, *Randlett v. Shalala,* 118 F.3d 857 (1st Circuit, 1997) at 862, citing *Bouman v. Block,* 940 F.2d 1211, 1229 (9th Cir.), *cert denied,* 502 U.S. 1005, 116 L.Ed. 2d 658, 112 S. Ct. 640 (1991), that even the failure to give a hardship transfer could be an adverse employment action. The Court states: "Assuming an improper motive, it is hard to see why denial of a hardship transfer in this case could not be discrimination under Title VII." The Court further cites other actions found to be adverse employment decisions stating particularly that, "a number of cases have extended coverage to slights or indignities that might seem evanescent, e.g., *McKenzie v. Illinois Dep't of Transp.,* 92 F. 3d 473, 484 (7th Cir. 1996) (employee given tedious minor duties); *Aviles- Martinez v. Monroig,* 963 F.2d 6 (1st Cir. 1992) (daily ridicule in client's presence)." *Id.*

Second Circuit

The United States Court of Appeals for the Second Circuit has also given broad coverage to the anti-retaliation provisions of Title VII. In *Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426 (2d Cir. 1999), the plaintiff alleged she was subjected to a racially hostile work environment and retaliation. The plaintiff's claims of retaliation included negative performance evaluations, transfer, harassing comments from coworkers, and termination. The Court affirmed the dismissal of Richardson's termination complaint but reversed the summary judgment dismissal of her retaliation claims stating: "We conclude that Richardson did establish a prima facie case of retaliation with regard to the transfer and reassignment. In particular, Richardson testified that she believed that DOCS

transferred her to CCF in the hopes that she would quit; that 'that whole situation and the stores clerk position was set up to force me out of there.'" *Richardson, supra,* at 444.

The Court cites other authority and further states:

> There was sufficient evidence to conclude that the transfer and reassignment -- which involved different job responsibilities and a move to a position involving contact with the prisoner population -- constituted an adverse employment decision. See *De La Cruz v. New York City Human Resources Admin. & Dep't of Social Servs.*, 82 F.3d 16, 21 (2d Cir. 1996) (deeming transfer to comparable position with no change in pay but different job responsibilities to constitute adverse employment decision); *Hampton v. Borough of Tinton Falls Police Dep't,* 98 F. 3d 107, 116 (3d Cir. 1996) (reversing grant of summary judgment and leaving for jury questions whether defendant's "reassignment" of plaintiff was in fact a "transfer" or a "demotion" and whether the move was an "adverse employment decision"); *Collins v. Illinois,* 830 F.2d 692, 702-04 (7th Cir. 1987) (lateral transfer with change in responsibilities but same benefits and pay is adverse employment action).

Id.

Third Circuit

District courts in the Third Circuit have explicitly rejected the Fifth Circuit's interpretation in *Mattern.* The District Court for the Eastern District of Pennsylvania, in *Saylor v. Ridge,* 989 F. Supp. 680, 689, (E.D. Pa. 1998), discusses the Fifth Circuit's decision in *Mattern* and states:

> Thus, the Third Circuit has not required that an employer's adverse action must be an 'ultimate' one as defined by the *Mattern* and *Dollis* courts and as we are not bound by the Fifth Circuit's decisions, we decline to adopt the Fifth Circuit's definition of 'adverse employment action.' See also, *Lee v. Gecewicz*, 1999 U.S. Dist. LEXIS 7317, (E.D. Pa. May 20, 1999) (formal reprimand could be adverse employment action.); *Ryales v. Phoenixville Sch. Dist.*, 2001 U.S. Dist. LEXIS 18735 (E.D. Pa. Nov. 16, 2001) (plaintiff's being told he was to be given an unsatisfactory performance rating were that rating might lead to termination and being told he was to be recommended for termination were both adverse actions).

The United States Court of Appeals for the Third Circuit has interpreted what constitutes an adverse employment action somewhat inconsistently. In *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1299 (3rd Cir. 1997), *citing Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 76, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986) the Court states in dicta that "formal reprimands that result in a notation in an employee's personnel file could be sufficiently concrete" to be classified as adverse employment actions. However, in *Weston v. Pennsylvania*, 251 F.3d 420, (3d Cir. Pa. 2001), the Third Circuit held that two written reprimands, which did not result in a demotion, did not change plaintiff's work schedule, did not result in reassignment to a different position or location, did not result in a change of hours or work and did not result in a denial of any pay raise or promotion, were of a temporary nature because they were not permanently affixed to Weston's employment file and did not change or alter his employment status in any way, were not enough to result in an adverse employment action.

Fourth Circuit

The Fourth Circuit, in *Von Gunten v. Maryland*, 243 F. 3d 858, 864 (4th Cir. 2001), notes the split in the circuits and states:

> Sometimes the practical differences between these two standards are difficult to discern. For example, although the majority of circuits have either implicitly or explicitly rejected the "ultimate employment decision" standard in § 2000e-3 cases, they have nonetheless recognized that "there is some threshold level of substantiality that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause." *Wideman v. Wal-Mart Stores, Inc.*, 141 F,3d 1453, 1456 (11th Cir. 1998)(collecting cases). Also indicative of the sometime slight real world difference between the two standards is the fact that while the Eighth Circuit has ostensibly adopted the "ultimate employment decision" standard, it has consistently applied a broader standard. See e.g., *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997) (ultimate employment decision includes "tangible change in duties or working conditions that constituted a material employment disadvantage"); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997)(ultimate employment decision includes reduction of duties, actions that disadvantage or interfere with the employee's ability to do his or her job, "papering" of an employee's file with negative reports and reprimands even though employee was "not discharged, demoted, or suspended").

> However, if strictly applied, use of the "ultimate employment decision" standard can be outcome determinative, as is crystalized in *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997). There, the Fifth Circuit expressly held insufficient the kind of discriminatory changes in the terms, conditions, and benefits of employment, which most other courts have recognized could constitute adverse employment action under § 2000e-3.

The Court goes on to state:

> But 'ultimate employment decision' is not the standard in this circuit. As noted above, see note 1, we have expressly rejected distinctions, like those drawn by the *Mattern* court, between § 2000e-2 and § 2000e-3, reasoning that "conformity between the provisions of Title VII is to be preferred." *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 366 (4th Cir. 1985). Moreover, in Ross, we also implicitly rejected the *Mattern* court's view that nothing less than an "ultimate employment decision" can constitute adverse employment action under § 2000e-3.

Supra, at 865.

And further:

> Although we have never before expressly so held, see Smith v. First Union Nat'l Bank, 202 F.3d 234, 248 n.11 (4th Cir. 2000), *Ross and Munday* teach that conduct short of "ultimate employment decisions" can constitute adverse employment action for purposes of § 2000e-3. Of course,

> "ultimate employment decisions" -- to hire, discharge, refuse to promote, etc. -- can constitute the necessary adverse employment action, but "retaliatory harassment" can also comprise adverse employment action. See Ross 759 F.2d at 363. What is necessary in all § 2000e-3 retaliation cases is evidence that the challenged discriminatory acts or harassment adversely effected "the terms, conditions, or benefits" of the plaintiff's employment. Munday, 126 F.3d at 243.

Id.

Fifth Circuit

In *Mattern, supra,* the United States Court of Appeals for the Fifth Circuit reversed the jury verdict in favor of the plaintiff who had alleged acts of hostility by fellow employees, theft of her tools, anxiety, a visit by supervisors to her home, verbal threats of termination, reprimands and her being placed on "final warning." In reversing the lower court judgment the Court states that "[t]he linchpin for this appeal is what constitutes an 'ultimate employment decision' as required for a retaliation claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a)." *Mattern, supra,* at 703. In deciding that Mattern had not suffered an "ultimate employment decision," the Court opines that "[t]he anti-retaliation provision speaks only of "discrimination"; there is no mention of the vague harms contemplated in §2000e-2(a)(2). Therefore, this provision can only be read to exclude such vague harms, and to include only ultimate employment decisions. *Mattern, supra,* at 709.

Justice Dennis propounded a strong dissent in *Mattern*, and states:

> The evidence provided a sufficient basis for a reasonable juror to find that, after the plaintiff engaged in protected activity by filing a Title VII harassment claim, adverse employment actions against her occurred in the form of retaliatory discrimination (of which the employer knew or should have known) that was not remediated and sufficiently severe or pervasive as to alter the conditions of her employment and create a hostile or abusive working environment, and that there was a causal connection between her participation in the protected activity and the adverse employment action.

Mattern, supra, at 710. Justice Dennis further cites the EEOC Compliance Manual § 614.7, which, in pertinent part, states:

> 614.7 *Examples of Forbidden Retaliation*
> (a) *Introduction*--Retaliation against people who protest unlawful employment discrimination can take many forms. Discussed in this subsection are some of the more widely recognized types of forbidden retaliation. This list is not intended to be exclusive.
>
> ******
>
> (c) *Harassment and Intimidation*--Harassing or intimidating an individual because that individual has opposed employment discrimination is a violation of § 704(a) and § 4(d). Harassment or intimidation can take many forms; some of the more common forms are set out below. (Also see § 615, Harassment; see also § 614.8(d) below):

******

(4) Retaliatory reprimands. Unpublished Commission Decision No. 71-445 (1971).

(5) Coercive questioning. Commission Decisions No. 71-1151, CCH EEOC Decisions (1973) P 6208. (See also *EEOC v. Plumbing and Pipefiters [sic] Industries, Local 189,* Title VII case.)

(6) Retaliatory surveillance. Commission Decision No. 70-683, CCH EEOC Decisions (1973) P 6145.

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(g) *Other Examples of Retaliation*--The following types of retaliation represent violations of § 704(a) and § 4(d) but do not come under any particular heading.

****

(2) *Permitting others to retaliate against charging party or complainant*--If others, such as coworkers or respondent's customers, retaliate against charging party or complainant for having opposed employment discrimination, the respondent will, under certain circumstances, have a duty to take steps reasonably calculated to end the retaliation. For example, if a respondent knows or has reason to know of acts taken against a charging party by others because of his/her opposition to perceived discrimination, such respondent has an obligation to seek an end to the retaliation.

Mattern, supra, at 711.

Even the Fifth Circuit has noted that it's holding in the *Mattern* case puts it in the minority of circuits. In *Burger v. Central Apt. Mgmt., Inc.*, 168 F.3d 875, 878 (5th Cir. Tex. 1999), the Court states:

> Our court has analyzed the "adverse employment action" element in a stricter sense than some other circuits. We have stated that Title VII was only designed to address "ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." *Mattern*, 104 F.3d at 707, (quoting *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995) (per curiam))(emphasis added). "'Ultimate employment decisions' include acts 'such as hiring, granting leave, discharging, promoting, and compensating.'" *Mattern*, 104 F.3d at 707(citations omitted).

And further, in footnote 3, states:

> The Eleventh Circuit has recently discussed the circuit split surrounding the issue of whether Title VII's protection against retaliatory discrimination extends to only "ultimate employment decisions." *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) We are not alone, but we are in the minority. Id.

Sixth Circuit

The United States Court of Appeals for the Sixth Circuit has recently discussed this issue in *Jeffries v. Wal-Mart Stores, Inc.*, 2001 U.S. App. LEXIS 16753 (6th Cir. July 20, 2001). The Court, at pp. 22-23 states:

> This court has long held that "reassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims." (Citations omitted). This circuit has adopted the Seventh Circuit's standard for assessing actions alleged to be a "materially adverse" employment action. *See Hollins v. Atlantic CO.*, 188 F.3d 652, 661-62 (6th Cir. 1999); *Kocsis*, 97 F.3d at 886 (quoting with approval *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)). The Seventh Circuit "listed certain factors to consider in determining whether an employment action was materially adverse: 'termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.'" *Kocsis*, 97 F.3d at 886 (quoting *Crady*). Of course, "a change in employment conditions 'must be more disruptive than a mere inconvenience or an alteration of job responsibilities.'" *Ibid.*

The plaintiff in *Jeffries* claimed that she had been retaliated against for filing a charge with the Ohio Civil Rights Commission (OCRC). Wal-Mart then blocked the plaintiff's access to various personnel-management-related computer programs, eliminated some of her responsibilities, and allegedly took actions that kept her from consideration of certain promotions. The Court then analogized the defendant's actions to a failure to promote case and stated that these actions resulted in adverse employment actions. *Jeffries, supra,* at pp. 24-25.

Seventh Circuit

The Seventh Circuit has discussed this issue in *McDonnell v. Cisneros,* 84 F.3d 256 (7th Cir. Ill. 1996). The *McDonnell* case involved two plaintiffs, one claiming retaliation in the form of harassment from management, the other claiming retaliation in the form of a lateral transfer for having failed to persuade co-plaintiff to withdraw her complaints. The Court held that the transfer of the latter plaintiff *was* an adverse employment action. Concerning the former plaintiff's claim, the Court dismissed it due to seeing no change in circumstances after she filed her complaint, and thus no causal connection. Nonetheless, the Court discussed what constitutes an adverse employment action and states:

> We do not doubt that anger, irritation, dirty looks, even the silent treatment, can cause distress and by doing so discourage complaints; and in other contexts even rather petty attempts at humiliation, if sufficient to deter the exercise of a right, have been held to be actionable as infringements of rights, for example the right of free speech. (Citations omitted). There is, however, a tension in the cases (including the cases of this court) with respect to whether more is required in a retaliation case under Title VII (or under any of the other federal employment discrimination statutes that are modeled on Title VII, such as the Age Discrimination in Employment Act), the more being something that can be described as a "materially adverse employment action." *Flaherty v. Gas Research Institute,* 31 F.3d 451, 456 (7th Cir. 1994); see also *Reed v. Shephard,* 993 F.2d 484, 493 (7th Cir. 1991); *Wu v. Thomas,* 996 F.2d 271, 273-74 (11th Cir. 1993); cf. *Nelson v. Upsala College,* 51

> F.3d 383, 388-89 (3d Cir. 1995). Other cases, notably *Passer v. American Chemical Soc'y,* 290 U.S. App. D.C. 156, 935 F.2d 322, 331 (D.C. Cir. 1991) reject this limitation. See also *Edwards v. Board of Regents,* 2 F.3d 382 (11th Cir. 1993), *Collins v. Illinois,* 830 F.2d 692, 702-04 (7th Cir. 1987), another of our cases, straddles the divide, by defining the required adverse job action very broadly.

McDonnell, supra, at 258.

In discussing the differences in 42 U.S.C. §2000-e-2(a)(1) and (2) and 42 U.S.C. §2000e-3, and recognizing the need to curtail retaliation so that employees may be unafraid to protect their rights, the Court states, "The provision regarding retaliation may intentionally be broader, since it is obvious that effective retaliation against employment discrimination need not take the form of a job action." *Id.*

Eighth Circuit

In *Kim v. Nash Finch Co.,* 123 F.3d 1046 (8th Cir. 1997), the plaintiff alleged he was retaliated against after filing an employment discrimination charge with the Iowa Human Rights Commission and the EEOC. The defendant's retaliation consisted of failure to be assigned to fill in for shipping foreman, lower performance evaluations, oral warnings concerning his alleged poor attitude, characterizing him as unwilling to take on more job responsibility due to his declining a Sunday assignment, placing him under constant surveillance, excluding him from meetings, issuing a written reprimand for a supposed race-based incident at work and reviewing its warehouse operations with the help of a consultant, discovering supposed productivity problems in the crew that the plaintiff supervised. The Court specifically

noted the plaintiff had not been discharged or demoted, had not received a reduction in compensation and had not been reassigned. *Kim, Supra* at 1052. In discussing whether an adverse employment action occurred, the court states:

> Typically, it is obvious whether an employer took adverse employment action when, for example, the employee has been terminated or discharged. However, retaliatory conduct may consist of "action less severe than outright discharge." *Dortz v. City of New York*, 904 F. Supp. 127, 156 (S.D.N.Y. 1995) (allegations that employer's actions disadvantaged and interfered with employee's ability to perform her job). . . . Kim's duties had been reduced; he received much lower performance evaluations than he had received before filing his employment discrimination charge; he was required to undergo special remedial training. There was also evidence that Nash Finch had "papered" his personnel file with negative reports, including two written reprimands. These are the kind of serious employment consequences that adversely affected or undermined Kim's position, even if he was not discharged, demoted or suspended. In any event, we need not decide in the present case whether each act in itself constituted actionable "adverse employment action" because Kim essentially claimed that Nash Finch had systematically retaliated against him, that is, that all the acts were taken in response to his filing the employment discrimination charge and were thus connected to one another. (Citation omitted). We hold that, as a matter of law, Nash Finch's conduct, which included reduction of duties, disciplinary action and negative personnel reports, as well as required

> remedial training, constituted adverse employment action.

Kim, supra, at 1060.

Ninth Circuit

The United States Court of Appeals for the Ninth Circuit has recently discussed what constitutes an adverse employment decision in *Fielder v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000), wherein the plaintiff's claims included retaliatory harassment from lower level employees. In discussing whether these actions constituted an adverse employment action the Court cites *Gunnell v. Utah Valley State College,* 12 F.3d 1253, 1264 (10th Cir. 1998) and states that "adverse employment actions are not limited to ultimate employment decisions." *Supra,* at 984. The Court further cites *Wyatt, supra,* at 15-16 and opines that, "adverse employment actions include 'employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and *toleration of harassment by other employees.*'" (emphasis added)." *Fielder, supra,* at 984.

The Court, implicitly noting the split in circuits concerning adverse employment actions, goes on to state that the interpretation of the Courts of Appeals of the First, Seventh and Tenth Circuits is the correct interpretation and further:

> is consistent with the plain language of 42 U.S.C. §2000e-3, which makes it 'unlawful to discriminate against any ... employees.' As the *Wideman* court explains, "the term 'discriminate' is not limited to 'ultimate employment decisions.'" *Wideman,* 141 F.3d 1453, 1456. If the statute were to be interpreted in a strict manner, employers could

> retaliate at will so long as the retaliation does not constitute an ultimate employment decision or rise to the level of a constructive discharge. *Id.* Because we have traditionally recognized the vital remedial role of Title VII, we hold, therefore, that Title VII's protection against retaliatory discrimination extends to employer liability for co-worker retaliation that rises to the level of an adverse employment action.

Fielder, supra, at 984-85.

Tenth Circuit

District Courts in the Tenth Circuit have explicitly rejected the Fifth Circuit's interpretation of 42 U.S.C. 2000e-3 as espoused in *Mattern.* The United States District Court for the District of Colorado, in *Deavenport v. MCI Telecomm. Corp.*, 973 F. Supp. 1221(D.Colo. 1997), at 1224, notes;

> The Tenth Circuit, however, has not adopted the *Mattern* standard. In fact, the Tenth Circuit has liberally construed Title VII to effectuate its remedial purpose. For example, in *Berry v. Stevinson Chevrolet,* 74 F.3d 980, 985 (10th Cir. 1996), the court interpreted the word "employees" in § 2000e-3 to include former, as well as current, employees. In doing so, the court "eschewed a literal reading of the section in favor of a reading that comported with the broad, remedial goals of Title VII." *Id.* at 985 (quoting *Rutherford v. American Bank of Commerce,* 562 F.2d 1162, 1165 (10th Cir. 1977)) "A statute which is remedial in nature should be liberally construed." 74 F.3d at 986

> Given the Tenth Circuit's liberal reading of Title VII, it is unlikely that it would agree with the Fifth Circuit that retaliation claims must be based upon an ultimate employment decision. To the contrary, although not addressing the issue specifically, the court has repeatedly permitted claims for retaliation based upon less than an "ultimate employment decision" as defined in *Mattern*. *See, e.g., Sauers v. Salt Lake County,* 1 F.3d 1122 (10th Cir. 1993) (stating that transfer or reassignment of duties constitutes impermissible retaliation); *Rutherford, supra* (holding that a negative reference by an employer who had previously given a positive reference constitutes impermissible retaliation); *see also McKenzie v. Atlantic Richfield Co.,* 906 F. Supp. 572, 575 (D. Colo. 1995); *Passer v. American Richfield Co.,* 290 U.S. App. D.C. 156, 935 F.2d 322, 330-31 (D.C. Cir. 1991).

After an extensive discussion, the Court in *Deavenport* ruled the plaintiff's allegations that the defendant had taken away several major work projects and forced her to travel extensively to Washington, D.C. would, if proved, constitute adverse employment decisions. *Deavenport, supra,* at 1227.

Eleventh Circuit

The United States Court of Appeals for the Eleventh Circuit has explicitly rejected the *Mattern* interpretation of 42 U.S.C. §2000e-3. In *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998) the plaintiff alleged the defendant had retaliated against her for filing an EEOC charge by making improper notations on her schedule, by making her work on a scheduled day off, by giving her

written reprimands resulting in a one-day suspension, threats from supervisory employees and by a needless delay in authorizing medical treatment when plaintiff suffered an allergic reaction.

In reversing the lower court's decision the Court states:

> Wal-Mart contends that none of those acts are sufficient to constitute an adverse employment action for purposes of a retaliation claim. Relying principally on the Fifth Circuit's holding in *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), Wal-Mart argues that unless the alleged act of retaliation was an "ultimate employment action" such as discharge or failure to hire, it does not qualify as an adverse employment action for purposes of an unlawful retaliation claim.

Wideman, supra, at 1455-56. The Court opines:

> There is a circuit split on this issue. While the Eighth Circuit has sided with the Fifth Circuit, *see Ledergerber v. Stangler,* 122 F.3d 1142, 1144 (8th Cir. 1997) (only adverse employment actions that "rise to the level of an ultimate employment decision [are] intended to be actionable under Title VII."), the First, Ninth, and Tenth Circuits have all held that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. *See Wyatt v. City of Boston,* 35 F.3d 13, 15-16 (1st Cir. 1994) (stating that actions other than discharge are covered by Title VII's anti-retaliation provision and listing as examples, "employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted

negative job evaluations and toleration of harassment by other employees.") (internal citation omitted); *Yartzoff v. Thomas,* 809 F.2d 1371, 1375 (9th Cir. 1987) (holding that such non-ultimate employment decisions as "transfers of job duties and undeserved performance ratings, if proven, would constitute "adverse employment decisions' cognizable under" Title VII's anti-retaliation provision); *Berry v. Stevinson Chevrolet,* 74 F.3d 980, 984-86 (10th Cir. 1996) (construing Title VII's anti-retaliation provision to reach beyond ultimate employment decisions and protect an employee from a malicious prosecution action brought by former employer). In addition, the D.C. Circuit has held that the Age Discrimination in Employment Act's anti-retaliation clause, which is identical to Title VII's, "does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion." *Passer v. American Chem. Soc'y,* 290 U.S. App. D.C. 156, 935 F. 2d 322, 331 (D.C. Cir. 1991) *See also, Welsh v. Derwinski,* 14 F.3d 85, 86 (1st Cir. 1994) (stating that the ADEA's anti-retaliation provision covers more than discharge, demotion, or failure to promote and that a "case by case review" is necessary to determine whether an employer's actions rise to the level of adverse employment actions for purposes of stating a prima facie case of retaliation).

We join the majority of circuits which have addressed the issue and hold that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. The Fifth and Eighth Circuits' contrary position is inconsistent with the

> plain language of 42 U.S.C. §2000e-3(a), which makes it "unlawful to *discriminate* against any of his employees ... because he has made a charge ..." (emphasis added). Read in the light of ordinary understanding, the term "discriminate" is not limited to "ultimate employment decisions." Moreover, our plain language interpretation of 42 U.S.C. §2000e-3(a) is consistent with Title VII's remedial purpose. Permitting employers to discriminate against an employee who files a charge of discrimination so long as the retaliatory discrimination does not constitute an ultimate employment action, could stifle employees' willingness to file charges of discrimination.

Id.

CONCLUSION

The split in the circuits regarding what constitutes an adverse employment action is readily apparent. The Fifth Circuit, and possibly the Eight Circuit, require a plaintiff to show that an "ultimate employment decision" has occurred in order to establish a prima facie case of retaliation. As evidenced by the preceding cases, this requirement is contrary to the intended purpose of 42 U.S.C. §2000e-3. As noted by the United States District Court for the District of Colorado:

> Were some discriminatory acts that had a real and negative effect on a person who brings a charge of discrimination under §2000e-2(a) permitted, it would have a chilling effect upon employees' willingness to make charges or support others' charges under that section. Title VII is remedial,

> and ...it should be interpreted broadly in light of congressional intent.

Deavenport, supra, at 1226.

Calvin White, after attempting to change the discriminatory practices of Ormet was harassed verbally, forced to perform menial tasks that others in his position were not forced to perform, was treated unfairly in the company's absentee program and was eventually terminated. It is true that Mr. White's absences were erased and he was offered his job back pursuant to arbitration. Nonetheless, these actions by Ormet have "a chilling effect upon employees' willingness to make charges or support others' charges." *Id.* Though Mr. White was offered his job back, the next person who complains may not be afforded the same opportunity. The reality is that other people may not take a chance on arbitration. Rather, these employees will endure a discriminatory work environment to maintain job security. By allowing employers to retaliate against those who make charges of workplace discrimination, so long as no "ultimate employment decision" occurs, the Fifth Circuit's interpretation of what constitutes an adverse employment decision under 42 U.S.C. §2000e-3 seriously undermines not only an employees protection under Title VII, but also the goal of a work environment free from discrimination.

Calvin White was retaliated against for his charges of racial discrimination and has suffered an adverse employment action. He should have his day in court.

Respectfully submitted by,

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Counsel for Petitioner,
Calvin White

APPENDIX

FILED
U.S. DIST. COURT
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SIGN_____
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EDLA CASE
JUDGE Lemmon

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CALVIN WHITE	CIVIL ACTION
VERSUS	NO: 97-1006
ORMET PRIMARY ALUMINUM CORPORATION	SECTION: "C" (1) EDLA: "S" (3)

ORDER AND REASONS

IT IS HEREBY ORDERED that Ormet Primary Aluminum Corporation's motion for summary judgment is **GRANTED.** (Document #27.) **IT IS FURTHER ORDERED** that "Defendant's Motion to Strike Exhibits Submitted by Plaintiff in Opposition to Motion for Summary Judgment" is **DENIED.** (Document #45.)

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Date: 04/20/00
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I. BACKGROUND

Ormet Primary Aluminum Corporation (Ormet) operates two facilities on contiguous land at Burnside, Louisiana: an alumina plant at which Ormet converts bauxite (aluminum ore) into alumina, and the Burnside Bulk Marine Terminal where ships and barges for the alumina plant and others are loaded and unloaded. Calvin White was employed at the alumina plant from January 30, 1989 until his discharge on September 5, 1997. White worked in the Digestion and Filtration Department, Area 335, of the alumina plant and was classified as a filtration auxiliary man from March 17, 1994 until his discharge. Most of the operators in area 335 are black. White was a union steward and a member of the negotiating committee for the United Steelworkers of America, Local 14465.

White filed an action against Ormet pursuant to Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e) *et seq.*, alleging claims of racial discrimination and retaliation for filing grievances. Ormet filed a motion for summary judgment.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper when, viewing the evidence in the light most favorable to the non-movant, "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 809 (5th Cir. 1991); Fed. R. Civ. P. 56(c). If the moving party meets the initial burden of establishing that there is no genuine issue, the burden shifts to the non-moving party to produce evidence of the existence of a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 321 (1986). The nonmovant cannot satisfy his summary judgment burden

with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence. Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). "[S]ummary judgment is appropriate in *any* case where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant." Id. (internal quotation and citation omitted).

III. DISCUSSION

A. Discrimination in promotion

In January 1995, Bobby Boyle,[1] the general supervisor in area 335, recommended White, Wallace Dillon, and Henry Gauthe as candidates for the position of shift supervisor in the department. Gauthe, who is white, received the promotion. In May 1995, White filed a complaint with the Louisiana Commission on Human Rights and the Equal Employment Opportunity Commission (EEOC), alleging that he was discriminated against based on race when he was denied a promotion to supervisor in January 1995.

Ormet's stated reason for not choosing White is that he did not pass the required basic reading skills test. White alleges that Ormet discriminated against him by failing to notify him of subsequent openings for a supervisor and by not allowing him to retake the reading skills test.

In McDonnell Douglas Corp. v. Green, 93 S. Ct. 1817 (1973), the Supreme Court "established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases." St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2746 (1993). "Employment discrimination claims brought under

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[1] Bobby Boyle is the son of Emmett Boyle, the owner of the alumina plant. The alumina plant was closed from December 1985 to August 1988, when Emmett Boyle purchased and reopened it.

42 U.S.C. § 1981, 1983, and 2000d are analyzed under the evidentiary framework applicable to claims arising under Title VII of the Civil Rights Act of 1964, as amended at 42 U.S.C. § 2000e *et seq.*" Lawrence v. University of Texas Medical Branch at Galveston, 163 F.3d 309, 311 (5th Cir. 1999).

"Under the Supreme Court's McDonnell Douglas-Burdine framework, the plaintiff first must establish a *prima facie* case by a preponderance of the evidence; once established, the *prima facie* case raises an inference of unlawful discrimination." Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 992 (5th Cir. 1996 (en banc).

The elements of a plaintiff's *prima facie* case vary according to the facts of the case and the nature of the claim. See LaPierre v. Benson Nissan, Inc., 86 F.3d 444, 448, n.3 (5th Cir. 1996). "Establishment of the *prima facie* case in effect creates a presumption that the employer unlawfully discriminated against the employee." Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089, 1094 (1981). "The burden of production then shifts to the defendant to proffer a legitimate, nondiscriminatory reason for the challenged employment action. Rhodes, 75 F.3d at 992-93. The "presumption places upon the defendant the burden of producing an explanation to rebut the *prima facie* case—i.e., the burden of 'producing evidence' that the adverse employment actions were taken 'for a legitimate, nondiscriminatory reason.'" Hicks, 113 S. Ct. at 2747. "The defendant may meet this burden by presenting evidence that, 'if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action.'" Rhodes, 75 F.3d at 993 (quoting Hicks, 113 S. Ct. at 2747). "If the defendant meets its burden, the presumption raised by the plaintiff's *prima facie* case disappears." Id. "However, the plaintiff is accorded the opportunity to demonstrate that the defendant's articulated

rationale was merely a pretext for discrimination." Id. The ultimate burden of persuading the trier of fact that there was intentional discrimination and that the professed reason was not the true reason remains with the plaintiff. Hicks, 113 S. Ct. at 2747.

To establish a *prima facie* case of racial discrimination in employment, the plaintiff generally must show "(I) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." McDonnell Douglas Corp., 93 S. Ct. at 1824.

White has established that he was black, that he was recommended by his supervisor for the promotion, he was rejected for the position, a white man was hired for the position, and he was not considered for future vacancies. Accordingly, he has established a *prima facie* case which raises an inference of unlawful discrimination.

The court now looks to the defendant for a legitimate, nondiscrimninatory reason for the employment action. Ormet asserts that White did not receive the promotion because he failed the reading test and presents sworn evidence that there was no intent to discriminate.

Debra Boger, Vice-President of Administrative Services, states in her affidavit that, in September 1994, the company implemented a general policy requiring that any candidate for a first-line supervisory position pass a basic reading skills test. Specifically, Ormet requires the candidate to pass the Ramsey Corporation Job Skills Test – Supervisory Reading – Form A. Since September 1994, no candidate who has not passed the test has been selected for a

first-line supervisory position. At the time that White took the test, the passing score was 37, and White scored a 32.[2] Therefore, he was not qualified for promotion to the position of shift supervisor. Boger further states that a person who fails the test is eligible to take it again after six months. However, company policy places the burden on the employee to ask to retake the test, although in certain instances, employees were reminded of their eligibility to be retested if they continued to show an interest in a supervisory position.

White asserts that race was the true reason he was not given the promotion. In his affidavit, he states that the supervisor's position was given to the only white applicant who was recommended, even though Gauthe knew virtually nothing about the operational procedures. White contends that supervisors were usually selected from within the departments where the workers were white. However, in his department where the four filter-area-man positions and the eight filtration-auxiliary-man positions were held by black males, the supervisor was not selected from within the department.

White attributes the discriminatory action to Boyle, alleging that it was widely known that Boyle is a racist. He contends that Boyle referred to blacks as "dumb niggers" and stated that he wished that he could get rid of them all. White presents affidavits of co-employees to support his allegations that Boyle is a racist. However, he provides no evidence that Boyle was involved in administering the reading test or was responsible for his failure to pass the test.

White does not offer evidence to carry his burden of demonstrating that the nondiscriminatory reason given by

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[2] White alleges that a passing score was 40, while his score was 34.

Ormet for the denial of promotion, his failure of the reading test, was a pretext. The evidence indicates that it is not the company's policy to remind employees that they are eligible for retesting, and White does not assert that he requested that he be retested or that he was denied that opportunity. Further, there is no evidence that the test was administered unfairly or that any employee was promoted to supervisor without having passed the reading test. Accordingly, White has not shown that the professed reason for failing to promote him to the supervisor's position was not the true reason, and the defendant's motion for summary judgment on this issue is granted.

B. Retaliation Claims

Title VII provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge . . . under this subchapter." 42 U.S.C. § 2000e-3(a). The burden-shifting structure applicable to discrimination claims is also applicable to unlawful retaliation claims. See Long v. Eastfield College, 88 F.3d 300, 304 (5th Cir. 1996). To establish a *prima facie* case for unlawful retaliation, White must prove that he engaged in activity protected by Title VII, an adverse employment action occurred, and there was a causal link between the protected activity and the adverse employment action. Id. Title VII protects an employee who opposes an unlawful employment practice or participates in an investigation or hearing under Title VII. Id.

White claims that he was retaliated against after he filed his EEOC claim for racial discrimination in promotion. White's claims that he was retaliated against in three ways: his overtime hours were reduced, he was placed in the Absenteeism Program, and he was wrongfully discharged from his position for sleeping on the job.

1. Retaliatory Reduction of Overtime

On November 21, 1995, White filed a charge of discrimination with the Louisiana Commission on Human Rights and the EEOC, alleging that he was denied overtime in retaliation for filing his claim of racial discrimination in promotion. White alleges in his complaint that Boyle, who was responsible for assigning overtime work, retaliated against him by reducing his overtime hours, beginning in August 1995 for about four months and again in April 1996 until his last day of work on September 1, 1997.

Ormet contends that Boyle assigned overtime in accordance with the procedures set forth in Article XVI of the collective bargaining agreement. Moreover, Ormet asserts that White worked more overtime during the periods in question than any other person in his classification.

All employees started with zero overtime as of August 14, 1994, the effective date of the labor contract. As general supervisor in the Digestion and Filtration Department, Boyle assigned overtime work to the employees. Boyle set forth in his affidavit the following procedures for assigning overtime prior to the changes dictated by the new labor contract on January 5, 1997.

Overtime is categorized as scheduled overtime or unscheduled overtime. Scheduled overtime, such as vacation time, is known in advance and is assigned to the employee on the Thursday before the week in which it is worked. Unscheduled overtime is available on short notice, such as when an employee calls in sick, and is assigned on the date it is worked.

An employee who wanted to work scheduled overtime signed his name in a calendar book kept in the supervisor's office no later than noon on the Tuesday before the week that the scheduled overtime was available. If

overtime hours were not available for everyone who wished to work, Boyle followed the system of priorities set forth in the contract with the union. The system favors those employees with the lowest number of hours on the overtime list.

Each Tuesday at noon, Boyle drew a line in the book under the names of those who had signed the book. Those employees whose names were above the line and did not receive scheduled overtime were considered for unscheduled overtime unless they removed their names. Other employees still had the opportunity to sign below the line to volunteer for unscheduled overtime. The same priority method set out in the contract and used for assigning scheduled overtime was then used to assign unscheduled overtime. An employee who did not strike his name from the calendar and declined overtime was normally charged with working those hours for purposes of standing on the overtime list in accord with Article XVI(E) (3) of the contract.

After January 1997, the calendar book was no longer used. A sign-up sheet was posted each week for each shift. Those employees interested in working overtime signed the sheet for the desired shift. If more people signed the sheet than there were hours available, employees were selected under the same priority method previously used.

During the period of August 24, 1995 through December 28, 1995, White worked 104 hours of overtime. Others in his classification worked 51.4, 36.0, and 58.4 hours, respectively. Because of the priority system which allocates the number of hours of overtime to the person with the least number of hours, Ormet contends that the total number of hours from the effective date of the contract through December 1995 provides a more accurate account of the overtime allocation. The records show that from August 14, 1994 until December 28, 1995, White worked a total of

572.8 hours. Others in his classification worked 167.5, 391,5, and 429.7 hours, respectively.

During the second period alleged by White, April 1996 through September 1997, White worked 419.8 hours of overtime. This figure represents more hours than any other employee in his classification. If the entire period from the beginning of the contract until White left the company is considered, White worked 1036.6 overtime hours. Other employees in his classification worked 459.6, 504.7, 590.5, 607.5, 786.5, 811.9, 826.6, and 1025.6 hours.[3]

White failed to establish a *prima facie* case that he was deprived of overtime in retaliation for filing his grievance. In a conclusory manner, White contends that Boyle did not follow procedure in assigning overtime, that Ormet did not keep accurate records of overtime, and that Boyle assigned overtime as he pleased. White has offered no evidentiary support for these contentions.

White further contends that Boyle told Charles Turner, Sammy Carter, Patrick Thompson, and Kenny McAllister that they could work all the overtime they wanted in the pilot plant and that he would not put it on the overtime schedule. White supports his allegation with the affidavit of Charles Turner, who states that he was told that he could work as much as he wanted and that he worked all the overtime that he could work. White also presents the affidavit of Andrew Thompson, who states that he was contacted at home to work overtime on an occasion that he had not signed the overtime book. Thompson asserts that he

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[3] There are more employees in the classification after April 1996 because the pilot plant opened, and the number of employees in White's classification increased. Those employees were charged with overtime equal to that of the high man on the list plus one hour. Therefore, 459.6, 504.7, and 811.9 are not actual numbers of the overtime hours worked by these employees.

later found out that White had signed the book and that he was qualified to do the job.

The evidence presented by White is inadequate to create a material issue of fact. The court cannot ascertain from the affidavits whether the alleged events occurred during the two time periods identified by White. Moreover, the affiants express no knowledge of White's circumstances during the time that they were offered overtime hours. Accordingly, White has not established that an adverse employment action occurred, and the defendant's motion for summary judgment on this issue is granted.

2. Retaliatory Placement in the Absenteeism Control Program

White contends that Ormet retaliated against him by disciplining him in the company's Absenteeism Control Program. On September 5, 1996, White filed a complaint with the EEOC and the State agency alleging retaliation. In this complaint, he alleges that he was placed on the second step of the company's Absenteeism Program on June 24, 1996, and on the third step on July 22, 1996, in retaliation for filing charges of discrimination against Ormet.

Ormet has a written Absenteeism Control Program that was distributed to all employees in March 1995. At Step 1 of the program, an employee who misses work or is tardy will be issued notification that further absenteeism will not be tolerated. At Step 2, if an employee is again absent or tardy, a written warning is issued if the employee has not completed 1040 working hours since the Step 1 warning was issued. Confidential counseling is also offered. If an employee is again absent or tardy after Step 2, a three-day suspension is in order if the employee has not completed 1040 working hours since the issuance of the Step 2 warning. Prior to the suspension, a hearing will be held with the

company representatives, the employee, and a representative of the union. If the employee continues to be absent or tardy, at Step 4, a hearing will be held, and the employee will be initially suspended for five working days subject to discharge. A final determination will be made by the management and communicated to the employee within five working days.

Under the general rules of the Absenteeism Control Policy, "[a]ll absences will be considered unexcused by the company unless proper medical certification is presented." Failure to present certification signed by the doctor, stating when the employee was seen and treated by the doctor, the nature of the illness, and whether the employee was able to work will render the certification void.

White was placed on Step 1 on May 24, 1996, because he had been absent seven full days and seven partial days between January 1, 1996, and May 1996. He was placed on Step 2 on June 24, 1996, because he had an unexcused absence on June 14, 1996. On July 22, 1996 he was placed on Step 3 due to his absence on July 20 and 21, 1996. White was not suspended for three days, based on a recommendation by Boyle. On November 4, 1996, White received a "last chance" notice that he would be placed in Step 4. White had "reported off due to injury" on November 1, 1996. On November 20, 1996, the company gave all employees, including White, a clean slate with regard to absenteeism.

Accordingly, White has not established a *prima facie* case for unlawful retaliation because he has not shown that an adverse employment action occurred. White's contention that his inclusion in the Absenteeism Program placed a stigma on him is unavailing because of Ormet's decision not to consider any absences prior to November 20th. The

defendant's motion for summary judgment on this issue is granted.

3. Retaliatory Discharge

White alleges that he was discharged in retaliation for filing racial discrimination complaints. Ormet argues that even if the discharge was based on a factual error, there is no evidence that the management team discharged White based on his race or in retaliation for filing grievances.

On September 1-2, 1997, White worked the 7:00 p.m. to 7:00 a.m. shift with Charles Turner, who was assigned to train White as a pilot plant operator. On September 2nd, Mickey Chaney, the shift supervisor, discovered White and Turner sleeping in the control room at approximately 4:25 a.m. when he was making his rounds. Chaney filed an incident report and gave the report to Boyle, his immediate supervisor. Boyle took no direct action against White and Turner, but reported the incident to the general manager, David Neal, and the labor relations superintendent, Dave Wilkinson. Wilkinson informed Greg Driscoll, Ormet's Corporate Industrial Relations Director, and Driscoll telephoned Earl Schick, the vice-president of Industrial Relations and Coated and Foil Operations, at his office in Wheeling, West Virginia, to discuss the situation.

It was the company's firm policy to discharge any employee caught sleeping. On November 2, 1994, Driscoll had sent a copy of the "Conduct and Working Rules" to all employees along with a letter reminding them that all employees were expected to follow the rules. All employees, including four white employees, who were reported for sleeping on the job, had been discharged since Driscoll assumed responsibility for labor relations at Burnside. However, Driscoll was concerned that there might be a walkout if White were fired because the collective

bargaining agreement had expired on August 14, 1997, and the no-strike clause was not in effect. Schick decided that White and Turner should be terminated if, after discussing the facts with the appropriate managers, it was determined that they were sleeping. After further discussions with Neal, Boyle, and Chaney, Driscoll instructed Chaney to meet with White and Turner when they returned to work and to suspend them subject to discharge.[4] The suspension was converted to discharge on September 5, 1997.

The union challenged the company's discharge decision and asked management to reconsider the decision and to reinstate White and Turner. The company denied the grievance at each step of the procedure, and the union proceeded to arbitration.[5] The arbitrator found that, although White and Turner may have been sleeping on the job, corroborating evidence was lacking. He stated that Chaney's failure to obtain a supporting witness resulted in a serious gap and weakened the company's case. On March 16, 1998, the arbitrator sustained the grievance and awarded White and Turner reinstatement with full back pay and benefits. On March 26, 1998, White informed Ormet that he was declining reinstatement.

Regardless of whether it is correct that White was sleeping on the job, White has not established a *prima facie* case for unlawful retaliation because he has not shown that an adverse employment action occurred. White received the relief he sough through arbitration when he was reinstated to his former job with seniority rights and awarded back pay

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[4] Suspension subject to discharge is a collective bargaining agreement procedure that must be followed in cases in which an employee represented by a union is believed to have committed a dischargeable offense. Article VIII, Section 2 of the 1994 Labor Agreement.

[5] It is unclear whether White presented this claim to the EEOC or the Louisiana Commission on Human Rights.

plus loss of any other benefits. White does not give a reason for not returning to his position, and he does not allege in his complaint that his actual reinstatement would have been to a lesser position or that he would have suffered any reduction in pay or benefits. Further, although White asserts throughout his memoranda that Boyle engaged in racist conduct and made racist remarks at the job site, he has not raised an argument that he was constructively discharged. See Barrow v. New Orleans S. S. Ass'n, 10 F.3d 292, 297 (5th Cir. 1994) (constructive discharge requires evidence that the employer made the working conditions so intolerable that a reasonable employee would feel compelled to resign). Accordingly, Ormet is entitled to summary judgment on this issue.

III. CONCLUSION

There are no genuine issues of material fact, and Ormet's motion for summary judgment is granted as a matter of law. Ormet's motion to strike the exhibits submitted by the plaintiff in opposition to the motion for summary judgment is denied.

New Orleans, Louisiana, this 17 day of April, 2000.

/s/
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

U.S. COURT OF APPEALS
FILED

SEP 07 2001

CHARLES R. FULBRUGE, III
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 00-30802

CALVIN WHITE,

Plaintiff-Appellant,

versus

ORMET PRIMARY ALUMINUM CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
For the Middle District of Louisiana
(97-CV-1006)

Before HIGGINBOTHAM, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

We affirm for essentially the reasons stated by the trial court. An arbitrator has set aside defendant's termination. We, of course, express no opinion on its validity.

AFFIRMED.

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

STATUTES

42 U.S.C. § 2000e-2. Unlawful employment practices

(a)Employer practices. It shall be an unlawful employment practice for an employer
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b)Employment agency practices. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c)Labor organization practices. It shall be an unlawful employment practice for a labor organization

(1)to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2)to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which

would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d)Training programs. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e)Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religions. Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment

practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations. As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) National security. Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security

of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h)Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions. Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended 29 U.S.C. 206(d)).

(i) Businesses or enterprises extending preferential treatment to Indians. Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of

such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance. Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases.
(1)(A) An unlawful employment practice based on disparate impact is established under this title only if

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative

employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores. It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n)Resolution of challenges to employment practices implementing litigated or consent judgments or orders.

(1)(A)Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws--

(i)by a person who, prior to the entry of the judgment or order described in subparagraph (A), had

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and

legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2)Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D)authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.

42 U.S.C. § 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception. It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a

notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment